THE NEW-YORK
CITY-HALL RECORDER.

VOL. I. *For April*, 1816. No. 4.

AT a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and county of New-York, at the City Hall of the said City, on *Monday*, the 1st day of *April*, in the year of our Lord one thousand eight hundred and sixteen—

PRESENT,

The Honorable JACOB RADCLIFF, *Mayor of the City of New-York*, } *Justices of the Sessions.*
GEORGE BUCKMASTER, REUBEN MUNSON, } *Aldermen*
JOHN RODMAN, *District Attorney.*
MACOMB, *Clerk.*

GRAND JURORS.

GILBERT ASPINWALL, *Foreman*,

BENJAMIN W. ROGERS,	STEPHEN BAKER,
ABRAHAM S. HALLETT,	JOHN BATTIN,
ABRAHAM BLOODGOOD,	SOLOMON LEVY,
NATHANIEL LAWRENCE,	NATH'L M'VICKAR,
ALBERT ANDERSON,	COLLINS REED,
JAMES JENKINS,	LEWIS FORD,
JONATHAN LAWRENCE,	WILLIAM OGDEN,
ROBERT S. ROBINSON,	JOHN SHUTE,
DANIEL SULLIVAN,	BALTUS MOORE.

JEREMIAH HILL'S CASE.

HAWKINS, *Counsel for the prosecution.*
WILSON, WYMAN, SAMPSON, & N. B. GRAHAM, *Counsel for the prisoner.*

In the traverse of an indictment under the statute for receiving stolen goods, *knowing* them to be such, though the thief is a competent witness, yet should his testimony in relation to such knowledge be uncorroborated by other testimony or strong circumstances, the Jury is justified in discarding his testimony, especially where he swears against a man of general good character. The testimony of a thief will not be believed by the Jury unless fully corroborated.

This was an indictment traversed during the last January Term, founded on the 13th section of the statute, (vol. 1. N. R. L. p. 410) for receiving a large quantity of goods stolen from George S. Wise, by Joseph D. Ando, knowing them to be stolen.

Hawkins opened the case on the part of the prosecution by observing to the Jury that there was a class of men in this city, licensed by the Corporation, and placed in a situation to take an advantage of the young and inexperienced, to lead them step by step in the path of vice until they are involved in ruin: that class or description of persons was pawnbrokers. They were frequently the receivers of stolen goods, and seduced, by their wiles, Clerks and Apprentices to betray their trust. He then proceeded to detail, in a brief manner, the testimony on behalf of the prosecution; after which he called on Joseph D. Ando, the person who stole the goods, and sold them to the defendant. His testimony was objected to, on the ground that he was a principal in the felony, but it was decided by the Court, that his credibility and not his competency was affected by that circumstance.

This witness, a young man of good external appearance, on being sworn, stated, that George S. Wise was a purser for the Navy, and kept a large clothing store in William street, in which Lynch was the head clerk, and himself was also clerk in the store. The witness first became acquainted with the defendant in June last. He called at the defendant's shop, and offered to sell a black silk handkerchief, which he stole out of the store. The handkerchief was worth fourteen or fifteen shillings, but the defendant only gave him six shillings. The defendant told him, that if he had any thing more he should be glad to purchase of him, but that he must expect to sell at a sacrifice at a pawnbroker's.

The next evening the witness brought him more of the same kind of goods, and sold them for the same price; and on an enquiry made by the defendant, the witness informed him that he lived at 200 Water-street, and that his name was Thomas Brown, which representation was wholly false.

The witness (according to his statement) sold to the defendant at divers times, about 130 of those handkerchiefs, at six shillings each, twelve shirts worth $3 50 each at seven shillings, three pea-jackets worth $10 each at fifteen shillings, and other articles to a considerable amount, for much less than their value.

After the witness had sold the handkerchiefs, he was fearful that an inventory of the goods in the shop would be made, and that he should be detected. He, therefore, applied to the prisoner, disclosed to him his true situation, and *gave him to understand*, that the goods were stolen, though he was not sure he informed him in so express terms. He requested the defendant to re-deliver the handkerchiefs to place back in the store, until after such inventory was taken, which request was denied.

Afterwards, when the witness called upon the defendant, he inquired of the witness how he had avoided the difficulty, who replied that he had credited the goods on the books. After this disclosure, the witness sold the defendant a greater quantity of goods than before.

It appeared on the cross-examination, that this witness lived beyond his income as a clerk, by frequenting taverns, and *other houses*, as he expressed himself, that his ill-gotten gains were thus expended; and that in December last, being accused of the felony by Lynch, the head clerk, he took Lynch aside, told him the whole

story, and begged of him not to bring him to punishment.

It appeared by the testimony of Lynch, that having missed a large quantity of the goods from the store, he was confident that they had been taken away by Ando; that he thereupon accused him of the crime, and that Ando at first boldly denied it, but at length, (as the witness thought) deeply penetrated by contrition, he trembled, and disclosed to the witness the whole transaction.

The next day Lynch went to the store of the defendant, and found many of the articles, the principal part of which was exposed for sale at the window. The defendant's shop is in Chatham-street.

A number of witnesses were called on behalf of the defendant, who fully established his general good character.

Wilson said, that with the Counsel on behalf of the prosecution, he was equally ready to deprecate the existence of any class of men in this city, calculated to seduce and lead astray from the paths of rectitude the young and inexperienced; but the case presented did not, in his mind, assume that aspect. His client, a gentleman, whose good name was of itself sufficient to give the lie to every syllable uttered by the principal witness, was selected by the public prosecutor as a victim; while that witness, with infamy itself stamped on his visage, was suffered to escape with impunity. The Jurors were required, by the public prosecutor, on the bare uncorroborated assertion of that wretch, to find that the defendant *knew* these goods to be stolen!—Is there, then, to be no distinction between virtue and vice? Was it possible that all the future hopes and prospects of his client—all his well-earned fame—nay, all that can render life itself desirable to an honest man, should, at once, be blasted by the foul breath of contagion itself?

Look, gentlemen of the Jury, at the foul character of the principal witness, established by his own showing. Having squandered his wages by living beyond his income, he imposed on the defendant by false names, false pretences, and expended the property of his employer, in taverns and brothels! He was a thief from choice, not from necessity. His was not the situation of the poor houseless wanderer, destitute of bread and employment, or that of the poor friendless outcast, begging from door to door, and depending on the mercy of a merciless world. No—his external appearance forbids the conclusion. Fortune smiled on him—friends surrounded him—he was placed in a situation of trust and responsibility: and, Oh! what an opportunity presented itself for him to become an ornament to society—an honor to his friends, had he not in an evil hour been allured by the gilded bait of temptation; From that moment his guardian genius fled forever—the radiant sun of his prosperity was overcast with black clouds, and now fallen, disgraced and ruined, the meanest reptile in the creation is an Angel of light compared with this abandoned profligate. And yet he appears against a respectable citizen, and you are shortly to be called upon, gentlemen, to pronounce the defendant guilty from such testimony! Is there, then, any safety in society? Could either of the Jurors be safe, if credence, for a moment, should be given by twelve men to such a witness? Was it possible, nay, was it requisite, to prove the converse of that stated by this witness? This is to be an important decision in the annals of this Court, and the important question was to be decided by the Jury, whether a man stained with the blackest crimes, shall have the power to destroy the reputation of an honest man, and subject him to punishment to screen himself, or to gratify the malignity of others.

No, said the Counsel, I speak not as the advocate, but in the proud triumph, the confidence of truth, that the Jury will immediately exculpate the defendant from the thraldom in which he has been placed by the barefaced villany of this witness, and restore him, as he ever has shown himself, a worthy member of society.

Sampson regretted that, in so plain a case, it should be considered necessary to say a single word in the defence.

Here is a young man, of the blackest character, arrayed against an honest respectable citizen. True, he is a pawnbroker; but, said the Counsel, it would be extremely wrong, merely through prejudice to that description of persons, to convict the defendant; for if he is found guilty, there can be no other reason—except that he is a pawnbroker.

Gentlemen, said he, is it to such a character as this young man you can look for truth? With a very little truth, he is guilty of stringing together, on this occasion, a great number of abominable lies, and you find him telling every thing a cunning mind, fertile in mischief, could suggest. The whole cause is to turn on the knowledge of the defendant that the goods were stolen, and that knowledge to be derived from the story of this thief of thieves.

Here the Counsel dwelt some time on the testimony of Ando. But why, said he, do I dwell on his story? Were it not that the goods were found at the shop of the defendant, I should not believe a word he has said. This fellow, after deceiving every body else, hopes to deceive the Jury, who to guard themselves, ought to disbelieve every word he has said.

You have, gentlemen, this dilemma, either he is a thief and stole the goods and you have a thief for witness, or he is no thief, and no goods were stolen, and then there can be no man convicted as receiver. Before you can convict in this case, being yourselves sworn, you must ratify his oath by yours.

The mind of this witness is so organized that

he cannot speak truth. As a crack'd viol produces sounds harsh, grating and discordant, and the sweet sound of music resounds not to the vibration of its strings, so the harsh discordant strains of falsehood naturally flow from the polluted lips of this witness. Pity it is that he was not scouted out of Court, with the execration of every man present upon his infamous head.—This impudent, hardened wretch, when detected in his villainy, trembled through contrition! But, mark, gentlemen, when publishing his own infamy before the world within these walls, he did not tremble. When he feared just punishment he trembled; when he was assured of an ill-earned impunity, he trembled no more!

Why, gentlemen, should he be gratified by your verdict against the defendant, he ought to be carted round the street in a chair in triumph, and proclamation should be made before him of his infamy and your credulity. But he sold the goods to the defendant, and *honestly* informed him they were stolen; and the defendant, with a full knowledge that the goods were stolen, instead of bundling them off to an auction room, receives them from time to time, and sticks them up on a pole in Chatham-street for sale! The Counsel concluded by declaring his full confidence that the Jury would acquit the defendant.

Hawkins, on behalf of the prosecution, commenced by saying, that if he had not been perfectly acquainted with the gentlemen who had preceded him, he should have believed they were arguing to gain time. Much had been said of the honesty and respectability of the defendant, and of the extreme hardship of his being arraigned for this misdemeanor. He ought rather to felicitate himself that he is not, at this moment, on his trial as a principal in this felony. Why ought he not thus to be tried? Is the gilded, accomplished seducer, who triumphs over ruined innocence, less an object of public execration than the female he has seduced? And, gentlemen, is the man in business, the man whose experience in life and sense of responsibility, and whose weight of years should have rendered him an example to youth, less a felon than the young inexperienced man, seduced by the gilded bait of temptation, and encouraged by such a man to proceed in the wily paths of iniquity? The Counsel had an important duty to perform; so had the Jury. It was not from malevolent motives, it was not merely because the defendant was a pawnbroker, that this prosecution was instituted; but it was for the sake of public example, to prevent this description of persons from decoying and seducing servants and apprentices to steal that property confided, necessarily, to their charge. And I do aver, for it is a fact, well known to the police of this city, that whenever it becomes necessary to institute a search for stolen property, the best place to search is at the pawnbrokers.

I therefore call on the Jury as the guardians of the public morals, to weigh well the circumstances of this case, and decide as their consciences dictate. I am ready to concede to the gentleman, that the single uncorroborated relation of a principal in a felony, should be received by a discreet Jury with allowance, yet, I aver the law to be, that even in cases of life and death, such testimony has been considered sufficient to convict the offender.

The Counsel here expatiated on the testimony of Ando, which he averred to be perfectly consistent: and combined with the testimony of Lynch, (by which it was corroborated) and also with the intimate nature of the transaction, was sufficient to set, even, cavil at defiance.

The appearance of this young man, was of itself sufficient to have roused the suspicions of an honest man. His exterior indicated that he was a Clerk in a store, yet large parcels of these goods are received from time to time, and a part of them are found in the shop of the defendant, and are here produced before you. This part of the evidence is admitted to be true; nor does the circumstance of exposing the goods for sale at his window operate in his favour, for he knew them to be goods of the same kind which were exposed in a thousand other places in the city. The defendant appears before the Jury under strong circumstances of suspicion, and if the equivocal act of producing a number of witnesses to swear to general good character, were sufficient to exculpate the defendant from suffering for a specific offence, clearly established, in vain may the community attempt to bring the hardened offender to punishment—in vain may a vigilant police bind and drag the victim of crime and iniquity to the altar of justice.

By the Court, delivered by his honor the Mayor.

Gentlemen of the Jury:

The important point, in this case, for your determination, is, did the defendant, at the time he received these goods, *know* them to have been stolen? It is not necessary that the thief should be convicted before the receiver can be brought to justice. The question of the knowledge of the defendant that the goods were stolen, depends solely on the credibility of Joseph D. Ando, the principal witness on the behalf of the prosecution. Formerly, the rule of evidence was, that an accomplice in the commission of a felony, was not a competent witness, and even after the rule was altered, by which an accomplice was declared competent, another rule was established, that the testimony of such a witness, standing alone, uncorroborated by other testimony, was insufficient to produce a conviction. The decisions, however, on which these rules of evidence were founded, have been overruled by a train of recent authorities; the question is now referrible to the credibility of the witness.

But, although this was now the established

rule of evidence, it behoves the Jury to weigh well the circumstances; and where a fair unblemished character was to stand or fall by the testimony of a witness, who in his statement necessarily discloses his own turpitude, it would be extremely dangerous for a Jury not to scrutinize such testimony with great care. In no case can the same credence be given to such testimony as to that of an honest man, standing unimpeached.

His Honor here recapitulated the facts and circumstances in the case, and concluded by repeating to the Jury, that the knowledge of the defendant that the goods were stolen, depended solely on the testimony of the young man who stole them: opposed to this testimony, is the general good character of the defendant, combined with the circumstance that the goods, when found in the shop of the defendant, were not concealed, but exposed for sale.

The Jury found the defendant *not Guilty*.

(ROBBERY.)

JOHN NORRIS' CASE.

To rob a man of money or other things, however small may be the amount, is punishable with imprisonment in the State Prison for life.

The prisoner was indicted for a robbery committed on Edward Rykeman, by whose testimony it appeared, that some time during the last month, between the hours of twelve and one at night, at a grocery in Market-street, he took out his money in the presence of the prisoner to pay for some liquor. The prisoner followed him unto Bancker-street, and seized him by the collar, and drew him by force into a yard, and then threatened, if he did not deliver his money, he would throw him into a cistern and drown him.

Rykeman told him he had but little money; but the prisoner persisted in his requisition, and actually thrust his hand into the waistcoat pocket of the prosecutor, and robbed him of $13. This witness declared he was put in great fear. The prosecutor called the watch, but did not receive timely assistance. The prisoner was arrested between four and five o'clock the next morning, at the same store where he saw Rykeman. The case was fully supported, and no evidence appeared on the part of the prisoner. After the remarks of the Counsel, the Mayor charged the Jury, that the crime of which the prisoner stood charged, consisted in feloniously taking the money or goods of another, in his presence, against his will, by violence or putting him in fear. This was a crime of a more aggravated nature than Larceny, simply considered; and that should the Jury believe the testimony on behalf of the prosecution, it would be their duty to find him guilty.

He was found *Guilty* by the Jury, and was sentenced by the Court to the State Prison for life—the Court observing, pronouncing sentence, that as the punishment was declared in the statute, in that respect they had no discretion, however trifling the amount the property might be.

NEAL G. MALCOLM'S CASE.

RODMAN & PHŒNIX, *Counsel for the prosecution.*

DR. GRAHAM & DRAKE, *Counsel for the defendant.*

An indictment for obtaining goods by false pretences, cannot be supported in a case where the defendant, by colour of a bail-piece, filed in the proceeding by foreign attachment, under the laws of the state of Pennsylvania, by the defendant for the prosecutor, had forcibly arrested the prosecutor in the city of New-York, and *extorted* money or goods from him, even should it appear, that in the original suit on which the proceeding was founded, the prosecutor had merely lent his name to another, as plaintiff, and had no interest or concern therein, which suit had been settled several years before, by compromise, and that in the aforesaid proceeding the defendant became bail for the prosecutor without his request, knowledge or privity, and for the purpose of benefiting himself, by dissolving such foreign attachment:

In such a case, an indictment for an Assault and Battery and false imprisonment can be supported.

It seems that *fraud*, rather than *force*, is essential to support an indictment for obtaining goods by false pretences.

Two indictments had been found against the defendant: the one for obtaining goods by false pretences from William L. Hull; the other, for an Assault and Battery committed on the same person. These indictments were founded on one transaction: and the Jurors were sworn to try the defendant on both charges at the same time.

We shall briefly state the facts in this very singular case, though not in the order in which they were related.

It appeared, that some time in the year 1812, Peter W. Edgell, an inhabitant of the city of Philadelphia, for some particular reason which did not appear in the testimony, requested Hull, the above named prosecutor, who was then in that city, to permit him to commence a suit in the name of Hull against John Welsh, or in other words, to lend his name for that purpose, upon an assurance that he should sustain no injury by that means. Hull assented, and the suit was commenced and prosecuted by Badger an attorney, who was employed by Edgell. The proceedings were such in that suit, that an award by arbitration for about $600, was obtained against Welsh, and Badger agreed to a compromise made with Welsh, by which he received the sum of $500, in full satisfaction of the award. Hull left the city of Philadelphia in the month of June, 1812, during which year, and while in the city, he became acquainted with the defendant, Malcolm; but it did not appear that they had any dealings together in that city. Before the departure of Hull, he gave an order to Edgell to receive the money

recovered by the award, in which suit, however, he was a mere nominal plaintiff.

In the spring of 1813, Samuel Darling, who had a demand against Hull for about $300, proceeded under the laws of Pennsylvania, by a foreign attachment against Hull, as an absent debtor, the object of which was to obtain the money recovered in the name of Hull against Welsh, or sufficient to satisfy his demand. The laws are such in a proceeding by foreign attachment in Pennsylvania, that on the appearance of the defendant, *by filing special bail*, the attachment becomes dissolved, and the suit proceeds in the same manner as if a capias had been originally issued; and if a judgment is recovered, the bail becomes liable, unless he can render his principal. The defendant and Edgell were proved to have been very intimate; and it appeared that in the month of June, 1813, the defendant became bail in the proceeding, by foreign attachment, in favour of Darling, against Hull, on the request of Peters and Delany, attorneys, to whose care and management the business of Badger, who had left the city, had fallen. It further appeared, that this proceeding, by foreign attachment, had been settled with Darling; the bail in which had been entered by the defendant without the request, knowledge, or privity of the prosecutor, who resided in the city of New-York. It further appeared, that the defendant, at the time he became bail, had a full knowledge of the circumstances under which the original suit was commenced, and of the situation in which it stood, and many circumstances were produced to show that the defendant had entered bail, rather for his own benefit, than for any other purpose. It did not appear that the defendant had received any injury by becoming bail. Under the above circumstances, in the beginning of March, as Hull was walking along Front-street, in this city, the defendant approached him, and after searching among the papers in his pocket, said to Hull, "I have a bail-piece against you." Hull at first supposed him not in earnest, but on an assurance by the defendant that it was true, Hull said that it must be a mistake, and requested an explanation, but received no other than that he had a bail-piece to take him to Philadelphia, which he should do immediately, unless the business was settled. Whereupon he seized Hull by the arm, as in the act of dragging him off by force. Hull requested to know the nature of the business, and that he might have the privilege of consulting Counsel, and for that purpose offered to give any reasonable security; but the defendant would hearken to no proposition of that nature, and contined his hold. Hull perceived that the people in the streets began to discover his situation, and rather than to have a mob collected, voluntarily went with the defendant to the store of Edgell above named, where Edgell, Edward M'Guire, and others were. Upon their arrival in the store, Hull again renewed his solicitations and offers above-mentioned, but the defendant refused to give him any further explanation or satisfaction, and said that he would take him neck and heels to Phila. and that if he resisted he would blow his brains out. After considerable conversation in that store, the defendant took Hull through several streets to the store of the defendant in Greenwich-street. Previous to and on their arrival at that place, he informed Hull that he was bail for him in the suit above-mentioned, but Hull did not understand the nature of the business, and the defendant still refused to permit him to apply to Counsel, and said the boat was ready in which he was to take him on the other side of the river, on the way to Philadelphia. On their arrival at the defendant's store, Hull finding his determination, at length told him that he was ready to agree to any terms he should prescribe; and the defendant at length told him that he would settle the business, if Hull would give him his watch, which was worth about $30, and execute to him his promissory note for $25, to which terms Hull acceded. After the delivery of the watch and note, Hull requested a receipt on the back of the bail-piece, which the defendant had uniformly refused to let him examine. This last request was denied, and the defendant thereupon took a paper, which during the trial was proved to be a certified copy of the bail-piece, and, before the eyes of Hull, tore it in above twenty pieces. It was also proved by several witnesses, that the defendant admitted that he knew the original suit was settled, and that he had procured the bail-piece for getting as much out of Hull as he could.

The creditors of Hull, at the time of the arrest, were proceeding before the Recorder of this city for an assignment of his estate, for the benefit of all his creditors, under the 9th sect. of the "Act for giving relief in cases of insolvency," (1 vol. N. R. L. p. 464.) and the notice to the creditors was then published.

On the production of the above testimony, *Drake*, on behalf of the defendant, proceeded to address the Jury on the charge for obtaining goods by false pretences. The court intimated that the indictment for that charge could not be supported, because it appeared by the testimony, that force was employed to extort property from the prosecutor, rather than fraud to deceive him. Whereupon the Counsel for the prosecutior abandoned that indictment, and the opposite Counsel contended, that the defendant had a right to arrest the prosecutor on the bail-piece. Badger had been employed in the original suit for the prosecutor. A proceeding afterwards, was instituted against the prosecutor by one of his creditors, founded on the original suit. Bail was entered by the defendant at the special instance and request of Peters and Delany, by virtue of the authority emanating from Badger, who had substituted them in his

place. The request, therefore, in effect, proceeded from Hull, and the entry of the bail was derived from his authority.

The entry of bail was a matter of record, and the highest evidence, and ought to be considered, after this lapse of time, to have been done at the request of the prosecutor. If so, the arrest was justifiable, and the indictment could not be supported.

Phœnix, in a very pertinent address to the Jury, argued, that the original suit, in which Hull had no interest or concern, having been compromised and setted, no proceeding could take place on that suit, which could by any possibility affect his right. An express agreement had been made between Hull and Edgell, that the former should suffer no injury by becoming a nominal plaintiff for the latter. The circumstances under which that suit was commenced, with its termination, were bound to the defendant. The defendant and Edgell were on very intimate terms, and the entry of the bail on the proceeding by foreign attachment, was a juggle and contrivance between them. It was done for the purpose of saving the difference between the amount of the award in the original suit, and the sum claimed by Darling. By entering bail in the proceeding by foreign attachment, the defendant in effect became bail for his own benefit; for on dissolving that attachment, he was entitled to the amount of the award; and even if he had been compelled to pay the amount of the claim of Darling, a balance would have remained of about $200. He could not therefore, by any possibility, have become a sufferer. Indeed it is not pretended. To take a certified copy of the bail-piece, filed in a proceeding, without the request or knowledge of Hull, with a full knowledge too that the original suit was commenced by Hull, merely as a nominal plaintiff, and that it had been settled, three years ago, in the manner stated by the testimony; to arrest Hull on this bail-piece, in a proceeding which was also settled, at the very time when the creditors of Hull were proceeding to obtain an assignment of his estate, under the Act of insolvency, and when the defendant knew that he could not leave the city, and to extort money by force under such circumstances, was so glaring an outrage, that, in the opinion of the Counsel, it came nearer the crime of *robbery*, than the offence of obtaining goods by false pretences.

His Honor the Mayor charged the Jury that although in *general* an arrest made by virtue of a bail-piece was justifiable in law, yet cases might occur, where such an arrest would be unlawful. Where a judgment has been paid and satisfied, the bail has no right to arrest the principal on the bail-piece.

Should the Jury believe that the original suit was settled on which this proceeding was founded, then it is the opinion of the Court that the defendant had no right to make this arrest. Or should the Jury believe that Hull became a mere nominal plaintiff, on the solicitation of Edgell, for whose benefit that suit progressed, until a compromise took place, and that the proceeding by foreign attachment was also settled, in the manner stated in the testimony, with the knowledge of the parties in Philadelphia, then the arrest was unjustifiable, and the defendant guilty. But if the Jury believed that a suit or proceeding was pending, in which there was a responsibility attached to Hull, and that he was liable to the defendant as bail, the defendant must be acquitted.

The defendant was found guilty by the Jury, but having made satisfaction to Hull, and compromised suits for private damages commenced against him, he was fined in a nominal sum by the Court.

EDWARD VAN ORDEN AND JAMES STEWARTS' CASES.

RODMAN, *Counsel for the prosecution.*

SIMONS, *Counsel for the prisoners.*

Where the case of two persons for Grand Larceny has been presented to the Grand Jury, and the names of both are endorsed on the back of the indictment, and also the words "a true Bill,' as if both were actually indicted, and the prisoners, on being arraigned, plead not guilty: in the traverse of such indictment, after the Jury is sworn in the common mode to try both the prisoners, should it be discovered that the name of one of the prisoners has been omitted, by mistake, in the body of the indictment, it is a matter of discretion with the Jury to acquit the prisoner, not named, from the charge, or to pass no verdict whatever in his case, or to return the special facts, and in either mode they may adopt, to leave the legal result for the decision of the Court.

It seems, that in such a case, the Court will not assume the responsibility of directing the Jury to treat the proceedings against the prisoner, not named, as a nullity. If, in the traverse of such indictment, no evidence is produced to show that the prisoner, not named, was concerned in the commission of the Felony, he is a competent witness in favour of the other.

Where the case, either on the part of the prosecution or the prisoner, stands well, the Counsel engaged, before introducing additional testimony to fortify such case, should ascertain with certainty, if possible, whether the testimony, if introduced, will corroborate or destroy the case. The legal bearing of each piece of testimony in a case, ought to be duly considered by Counsel before such testimony is offered.

The indictment in this case was found and traversed during the last term. The Jurors were sworn to try the prisoners on a charge of Grand Larceny, in stealing a large quantity of clothing, laid in the indictment, as the several properties of Mary Skidmore and Daniel Feerman. To an indictment, on the back of which the names of both defendants, and also the words "a true bill," had been endorsed, in the common mode, by the Grand Jury, the defendants had plead not guilty on arraignment; but it was discovered on the trial, before any testimony was introduced, that the name of *James Stewart*, in the body of the indictment, had been omitted by mistake.

The Counsel for the prisoners moved the

Court to direct the Jury to acquit Stewart from the charge, before proceeding further.

Rodman contra, contended that the Jury could not legally render a verdict in favour of Stewart, inasmuch as he had not been indicted. He apprized the opposite Counsel and Jury, that he should introduce no testimony against Stewart, because he did not then consider him on trial.

By the Court.—We will give such direction to the Jury, when the case is left for their determination, as shall appear to us conformable to the principles of justice. Let the trial proceed.

It appeared in substance by the testimony of Mrs. Skidmore, that she kept house for Feerman, at No. 115 Bancker-street, and that the several articles laid in the indictment, which were produced in Court, valued and identified, were in the bed room lying on a trunk at the head of the bed, from which place they were stolen.

Sarah Smith, who resides at Corlear's-Hook, proved that one morning during the winter, between day-light and sunrise, she discovered Edward Van Orden in the yard at the back of the house, and knowing his character, was fearful that he had no good intent, and asked what he did there, to which he made no reply, but went off. She did not see him have the clothes, but in about half an hour after this, she found the clothes in a pillow-case in the yard. She then gave information to Robert Phillips, one of the officers of the police, when it appears, by some means, information was obtained who the owners were, and the two prisoners were apprehended.

The Counsel for the prisoners here offered to introduce Stewart as a witness in favour of the other prisoners.

Rodman contra, contended that the witness ought not to be admitted. A complaint had been laid before the Grand Jury against him for the same offence; besides, he now stood before the Court in a very peculiar situation.

By the Court.—He is not disqualified; the objection affects his credibility only.

Stewart, on being sworn, stated in substance, that Van Orden did not steal the goods or put them in the yard, but that two other persons brought the clothes to Van Orden and himself, &c.

To counteract the effect of this testimony, *Rodman* produced a witness, who swore that about the time the property was found, Stewart declared to him that Van Orden and himself obtained the clothes at a house in Bancker-street.

Mr. O'Blenis, a witness on behalf of the prosecution, was then introduced to impeach the testimony of Stewart. On being sworn, he stated in substance, that about the time the prisoners were taken, Stewart called on him, and informed him that he wished to impart something of importance, and then said, that John (a brother of Edward Van Orden) had stolen this property, and gave it to Edward! ! !

Simons contended to the Jury, that the testimony against Van Orden did not support the indictment. There was no circumstance to show that he ever had the goods in possession, except being seen in the yard of Mrs. Smith, which, of itself, was very equivocal, much less was there any circumstance in the case, showing that he took the property.

Rodman contended, that the strong circumstances of guilt against Van Orden, were sufficient to establish his guilt. He was seen in the yard where the goods were found at an unusual time of the day.

By the Court, delivered by the *Recorder*.—Gentlemen of the Jury—In this case, there are several perplexities arising from the singular course which it has taken, which it will be our duty to dispose of before proceeding to the merits.

By a mistake, which is ever apt to occur in the hurry of business, the name of Stewart had been omitted in the indictment, to which both of the defendants plead not guilty, and on which you have sworn to try them jointly. The court is not disposed to say that the proceeding thus far against Stewart is a nullity; but deem it more prudent to advise you to a discreet consistent course on the occasion. In the opinion of the Court, it ought to be, and is left to the discretion of the Jury, either to find a verdict of acquittal in the case of Stewart, or to pass no verdict, or to find any special fact they may think proper; and in either of the modes they may adopt, to leave the legal consequences to the Court.

After disposing of the case of Stewart, it will be your duty to examine that of Van Orden, who stands legally before you. The question for your consideration is, whether Edward Van Orden is guilty of this offence? Should it be your opinion that he received the goods from his brother John, or that any other person or persons took the property, and Van Orden was not present, aiding and assisting, he must be acquitted, though you should believe him to be the person who left the goods in the yard of Mrs. Smith.

Had the prosecution rested on the testimony of Mary Skidmore and Sarah Smith, I believe that you will say with me, that the testimony would have been insufficient to have produced a conviction; because, although the property was stolen, and deposited in a particular place, near which the prisoner was then standing, even at an unusual hour in the day, it does not follow that he was the thief. The goods were not seen in his possession, and without that circumstance, in conjunction with the others, it would have been utterly unsafe to have convicted him. Had the Counsel for the prisoner here abstained from calling any testimony, he

must have been acquitted; but James Stewart is produced as a witness in favour of Van Orden, and in substance tells us, that Van Orden did not steal the goods. Here a door was opened to the public prosecutor to impeach the testimony of Stewart, which he does by calling on Abraham Miller, and by reading part of Stewart's examination in the police. Miller stated in substance, that about the time the prisoners were taken up, Stewart admitted to the witness, that himself and Van Orden did get the goods at a house in Bancker-street.

The object on behalf of the prosecution was at this point fully accomplished, and the testimony of Stewart stood impeached.

But Mr. O'Blenis is here introduced as a witness on the same side, who stated that Stewart declared, when under examination in the police, that John, a brother of Edward Van Orden, stole the goods and brought them to Edward. This declaration, if of any effect, tends rather to weaken the presumption of the guilt of Van Orden.

Under the peculiar management of the case, it is deemed by the Court highly important, and it is hoped will be of much use to the Counsel. Testimony, with all its legal bearings, should be duly examined; and when a case stands well on either side, the counsel should be extremely cautious of introducing testimony, unless that testimony is known to be corroborative of the case.

On the whole, it must be left for you alone to determine, under all the circumstances of this very singular case, whether Edward Van Orden is or is not guilty of the charge laid in this indictment.

The prisoners were acquitted on this charge, and during the same Term, they were tried on an indictment for forgery and passing counterfeit money, from which they were also acquitted.

JOHN PAINE'S CASE.

RODMAN, *Counsel for the prosecution.*
WILSON, *Counsel for the prisoner.*

In a case where a man steals goods, in the county of Westchester, and is taken in the city of New-York with the goods in his possession, he may be indicted and tried in the latter place, on an indictment in which the venue is laid in New-York without a *videlicet*.

The prisoner was indicted for Grand Larceny, in stealing a sum of money in silver coin and bills on the Corporation of Singsing, of divers denominations, amounting to about $50, the property of Betts, Horton and Joshua Horton. The indictment alleged the offence to have been committed *in the sixth ward of the city of New-York.*

It appeared by the testimony of William Horton, a clerk in the store where the money was stolen, at *Whiteplains, in Westchester county*, that on the 28th day of March last, at ten o'clock at night he retired to rest, having taken the drawer containing the money laid in the indictment from its place, and put it into a box in another part of the store. In the morning he found the windows had been opened, and the drawer was found a short distance from the store door rifled of its contents. The money was produced which was found on the prisoner, and this witness among the silver change discovered a piece of silver, which he immediately recognized by a particular mark. The money which was contained in a handkerchief was sufficiently identified.

The prisoner brought this money contained in a handkerchief, to Francis Parsons in this city, and offered to sell the whole for $3; and from the conduct of the prisoner, in conjunction with his answers to the inquiries put to him, it was discovered that he had not come honestly by the money. He was taken to the police-office with the property, and the police magistrates not finding any positive testimony against him, were on the point of discharging him, when one of the owners of the money made his appearance and described the property, whereupon the prisoner was secured. He stated to the persons to whom he offered the contents of his handkerchief, as before related, and also to the police magistrates, that he came from Massachusetts, and gave many absurd and coutradictory accounts of the manner in which he acquired the property.

Wilson moved that the prisoner be discharged from the indictment on two grounds:

1st. That it appeared from the testimony that the felony was committed without the jurisdiction of the Court.

2d. Even if the prosecution could be supported in this city for stealing goods in Westchester county, it was necessary to allege in the indiotment that the crime was committed in the county of Westchester, *to wit, in the city and county of New-York.* The indictment was therefore defective in that particular.

Rodman contra, cited 2d vol East's C. L. 771. 2d Johns. Rep. 477. Gardner's case, and 2d vol. Massachusetts Rep. 14.

By the Court.—There can be no doubt, on principle, that the possession of goods by the felon in any county where he may carry them, is a Larceny continued; for at no instant of time is the owner divested of his legal right of possession. The continuance of the trespass and felony, amounts to a new taking and carrying away, in any county, wherever he may be found in possession of the goods. And on this principle; it is not necessary in the indictment to refer to the county where the original asportation took place by a *videlicet.*

The prisoner was immediately found *Guilty.* He was sentenced to the State Prison for three years and one day.

JOHN FERGUSON, JOHN HATTEN AND THOMAS SMITH'S CASES.

RODMAN, *Counsel for the prosecution.*
N. B. GRAHAM and P. W. GALE, *Counsel for the prisoner*

The identity of new goods, articles of merchandize, on which the owner has no particular mark, is sufficiently proved, by testimony, that the goods stolen were of the same description, taken in connexion with circumstances confirming such identity.

Should the Jury even believe that one of the witnesses introduced on behalf of the prosecution, in the traverse of an indictment for Larceny, was concerned in the felony, yet if the relation of such witness is supported by other testimony and the circumstances of the case, such relation will not be discarded.

The prisoners, three blacks, were indicted, tried and found guilty of stealing a large quantity of silk handkerchiefs, stated in the indictment as forty pieces, of the value of $300, the property of John Hone, Philip I. Moore and Charles Town.

It appeared that about the middle of March, the goods laid in the indictment, constituting the parts of packages of the same kind of articles, and as samples thereof, (which packages were opened and exposed for sale, in the store of these gentlemen,) were stolen. A deficiency was discovered in a number of the packages, and the prisoners with others, were employed as workmen in the store the same time the property was stolen. They were not immediately suspected of the felony, but on missing the goods, an enquiry was made by the owners, and Philip Hone, one of them, understanding that goods of the description lost were exposed for sale in Chatham-street, procured a warrant, and with Francis Tillou, one of the police officers, proceeded to the house of Sarah Strang, who at first denied any knowledge of the goods, but at length told them, that she had purchased goods of that description, and had sold them to Simeon M. Tompkins, who keeps a store in Chatham-street. On proceeding to that store, a part of the goods laid in the indictment was found and reclaimed by the owner. These goods were produced in Court, and so far identified, that Mr. Hone and John Brevoort, a clerk in the store from which the goods were stolen, both swore that they were goods of the same description as those which were stolen, and that they believed them to be the same: a strong additional circumstance to show their identity was, that a gross of buttons was stolen at the same time the other goods were, which buttons Mr. Brevoort was enabled to identify with absolute certainty. It appeared by the testimony of Mrs. Strang, and that of her son, a young lad of about ten years of age, that the prisoners brought goods of the same description as those produced, to her, and offered them for sale, alleging that they were the venture of some young men who had then recently returned from sea, and that she, *having no suspicion that the goods were stolen*, having enquired the price, and ascertained by applying to Tomkins that she should be enabled to make about two shillings on each handkerchief, purchased them, and immediately sold them to Tomkins. Ferguson, it appeared, came, at a different time, with the buttons, which she also bought. In the course of the trial, it was proved, that at the time she sold the goods to Tomkins, she requested him to keep it a profound secret. The prisoners were proved to be men of that description who *work along shore;* and from their appearance, any one would believe, to see them with a quantity of goods of the description stated in the indictment in their possession, that they must have been stolen, whatever might be their representation. One of them was as ragged as a bear, and neither of them appeared to be *silk merchants.* This woman, it also appeared, kept a *grocery store*, and had been acquainted with these men before.

Several respectable witnesses were called on behalf of the prisoners, who showed, in substance, that, as far as their knowledge extended, the prisoners were honest men; and one witness stated, that at a particular time, and place, he lost his pocket book, in which there was a considerable sum of money, and that, on enquiring of the prisoners, who were at work near the place where it was lost, one of them said he had found it, and voluntarily returned it with the money.

The Counsel for the prisoner, on two grounds, contended, that the prisoners ought to be acquitted by the Jury: the goods were not sufficiently identified, and for aught that appeared to the Court, the goods might have come honestly into their possession. Mr. *Graham* insisted, that no reliance should be placed on the testimony of Mrs. Strang, because when called on by the owner, she denied any knowledge of the goods, and both contended, that from the circumstances of doubt in the case, when taken in connexion with the good character of the prisoners, they ought to be acquitted.

After the argument of Mr. *Rodman*, wherein he ably refuted the several objections raised by the opposite Counsel, his Honor the Mayor charged the Jury, that the principal question for their decision was, whether the testimony of Mrs. Strang and her son was entitled to belief.

There were two important circumstances which detracted from her credibility. She purchased these goods of persons, who, from their mode of life and general appearance, might, with much reason, be suspected. When called on by the owner, and Marshal, she denied purchasing the property. But although the Jury might even believe that she was concerned in the felony, or received the goods, knowing them to have been stolen, yet, if from all the circumstances, taken in connexion with her story, they further believed the prisoners to have been concerned in the theft, it would be the duty of the Jury to find them guilty. A

strong circumstance against them was, that they were engaged as labourers in the store from which the property was taken, the same day it was stolen. The property having been traced to their possession, in the mode stated in the testimony, it was incumbent on them, in the opinion of the Court, to account for such possession.

The identity was shown sufficiently; and a strong circumstance confirming the same, was, that the buttons stolen from the store, at the same time, were positively sworn to, by the clerk in the store. The evidence of good character alone, in a case fully supported by testimony, and strongly fortified, never can avail a prisoner. If, therefore, the Jury, combining the circumstances of guilt adduced on behalf of the prosecution, with the relation of Mrs. Strang, and that of her son, believed that relation, it would be their duty to convict the prisoners.

The Jury immediately found them *Guilty*, and they were sentenced to the state prison each for three years and a day.

(PETIT LARCENY.)

THOMAS HICKS' CASE.

When the naked confession of a felony is relied on, the whole is to be taken together.

The prisoner was indicted for Grand Larceny, in stealing $80, in Bank bills and Corporation notes, the property of David Lowerce.

It appeared by the testimony of Mary Lowerce, the wife of the prosecutor, that on the Saturday night preceding the trial, the store was broken open, and the money laid in the indictment stolen.

The only positive evidence against the prisoner was his examination, taken before the police magistrates, by which it appeared, that about twelve o'clock at night, he went to the store of Lowerce, and broke a pane of glass in one of the windows, and entering the store, stole about $3 in Corporation notes!

He was found *Guilty* of Petit Larceny, and sentenced to the City Prison for one year.

(GAMBLING.)

JAMES BUTLER'S CASE.

RODMAN, *Counsel for the prosecution.*
ANTHON, *Counsel for the defendant.*

A public Inn where any instrument or device for gambling is used and kept as such, either by the landlord or any other person, by his *permission*, however orderly the house may be in other respects, is a *public nuisance* at common law; and all persons resorting to such house, for the purpose of *gambling*, are, *in the eye of the law*, persons of *ill fame*.

Counsel have no right to put a question to a witness, the answer to which, if true, might impeach his own motives in the institution of a criminal prosecution. This must be done by other evidence.

The defendant, the landlord of the Park Coffee-House, was indicted at common law, for keeping a gambling house. It appeared that in one of the rooms in the building, occupied by the defendant as a public Inn, in this city, there is a billiard table, and other instruments used in playing the game, which room and instruments have been, for several weeks past, hired to Frederick Sebert, a young man who boards with the defendant. For the use of the room and tables, together with his board, Sebert allows the defendant $13 a week. Sebert has the privilege of charging the company 6*d.* a game, and the liquor drank is furnished at the bar-room of the defendant. There are printed regulations pasted up in the room, forbidding the company to play for money; although in some instances the rules have been infringed on, in that particular. But it was not proved that this was known by the defendant, who had uniformly forbidden all persons to play for money. According to the regulations, the room is shut at twelve o'clock at night; and genteel company, consisting of married as well as young men, resorted to the room for the purpose of playing this game. It appeared that the billiard table had been kept by the defendant principally for the amusement of his boarders.

It appeared further, that about six weeks ago, there was a *faro table** kept in one of the rooms, in the third or fourth story of this house, by some Frenchmen, to which persons resorted for the purpose of gambling. This was called the club-room. Some time ago, the defendant suppressed this practice in his house, and caused these Frenchmen to leave it; (but they afterwards returned for a time) and in various instances, the defendant prevented his guests from playing cards for money, and he was uniformly so strict against the practice of gambling, that he had lost many boarders and much custom. Several very respectable witnesses testified, that they had been acquainted with many public houses, in different parts of the United States, and they had never seen one conducted with more order. Many gentlemen, belonging to the denomination of Friends, had been entertained

* The game at the *faro table* is played with cards in this manner: a pack of cards is displayed on the table, so that the face of each card may be seen by the spectators. The man who keeps the *bank* (as it is termed) sits by the table, with another pack of cards, and a bag containing money, some of which is also displayed. Suppose A keeps the bank, and B wishes to play for 5 dolls. A shuffles the pack which he holds in his hand, while B lays the money intended to be bet, (5 dolls.) on any card he may choose as aforesaid. A then runs off the cards alternately in two piles, one on the right, the other on the left, until he reaches, in the pack, the card corresponding to that on which B has laid the money. If in this alternation, the card chosen comes on the right hand, A takes up the money; if on the other, B is entitled to 5 dolls. from A. We speak only from information, and may not be correct with regard to the *side* on which, if the chosen card comes, A or B is entitled to the money; nor is any thing more than the *principle* of the game *material* for our purpose.

Several persons are generally engaged at the same table, and at the same time in the game with A, and it must be obvious what a vast advantage the man who holds the *bag* has over those who are unaccustomed to the various tricks and devices practised by professed gamblers.

at his house, and expressed their entire satisfaction at the regularity which prevailed therein.

During the trial, the Counsel for the defendant, in the cross-examination of one of the witnesses introduced on behalf of the prosecution, first enquired of him, whether, when he left the house of the defendant, he was not indebted for board; to which the witness answered in the affirmative. The Counsel then put this question: Did you complain of the defendant, and have him indicted because he required payment?

By the Court to the Counsel. You have no right to put a question to the witness, the answer to which might impeach his own motives · you must show this by other testimony.

After the introduction of the testimony on both sides, *Anthon* insisted before the Jury, that as this indictment was at *common law*, it was incumbent on the public prosecutor to show that the defendant was guilty of an infraction *of that law*. The indictment charged the defendant with harbouring divers persons of *ill fame* in his house, for the sake of lucre. The house was indicted as a *common nuisance*, and the principles of the common law required, that these allegations should be fully supported by evidence. The testimony, however, in this case, wholly negatived the charges. So far from being a common nuisance, and a resort for idle and dissolute persons, it had been clearly established, that persons of the first respectability resorted to the house for entertainment. The instruments of gambling, were kept, principally, for the amusement of the boarders, and the defendant was so strict in his regulations, so averse to gambling, that in various instances, he had injured his interest.

Rodman conceded to the opposite Counsel, that the defendant kept a house, orderly and well governed in all other respects, except keeping instruments of gambling, and permitted them to be used for that purpose. This, at common law, is a *public nuisance;* as such, it is indictable. It may be true, in point of fact, that such as is termed genteel company, in general, resorted to the house for gambling; but it was also true, that persons who have been convicted in this Court of forgery and passing counterfeit money, have been arrested in this billiard room. (Vide. Ante, p. 48.) The law regards, in general, the evil of keeping a house open, for the reception of idle, dissolute persons, persons of *ill fame;* and whoever resorts to any house, for the purpose of gambling, however *genteel* he may be in other respects, is a person of *ill fame*. This was a case, which, for the purpose of repressng the evil, in general, and preserving the morals of the community, required the severe and pointed animadversion of the Court and Jury.

The Mayor charged the Jury, that although there was an express statute in this state, against keeping any instrument or device for gambling in a public house, this offence was not the less repugnant to the principles of the common law. A public house, in which gambling is practised or permitted, is a nuisance at common law, the continuance of which is considered as contrary to good manners.

The most important fact for the determination of the Jury, in this case, was whether the defendant knew that the *faro table* was in his house, and suffered it to remain therein for the purpose of gambling. The billiard table was not indictable at common law, except it was used for the purpose of gambling, and it was in evidence that the defendant had endeavoured to prevent this practice; the *faro table* was an instrument or device peculiarly adapted for the purpose of gambling.

With regard to the indictment, it is true, that it was alleged therein, that this house was a commou resort for divers idle, dissolute persons, and persons of ill fame; but it was necessary for the Jury to understand, that in an indictment many things were stated as matters of form, and that in the eye of the law, any person whe frequents a house for the purpose of gambling, is a person of *ill fame*. Although, on this occasion, the court could have wished that this offence could have been fastened on a defendant who had kept a house of a worse description—a defendant whose general conduct was more deserving of the animadversion of public justice, yet Courts and Juries have no choice. They are bound as conservators of the morals of the community, to endeavor to check the progress of this vice, whenever it may fall under their cognizance.

The defendant was found *Guilty* by the Jury.

(COCK FIGHTING.)

CHARLES MEYERS, ROBERT DEWITT, INDICTED WITH OTHERS, AND JOHN GARLOCK, JOHN I. MOORE, AND PETER M'INTYRE'S CASES.

Where it appears on the traverse of an indictment for an Assault and Battery, that it was committed at a house kept for the reception of cock fighters, in which there is a cock pit, the Court will recognize the witness to appear before the Grrnd Jury, to give evidence against the owner or occupant.

Persons, who plead guilty to an indictment for keeping a house, denominated in law, a public nuisance, for the resort of idle, dissolute persons, of ill fame and dishonest conversation, for the sake of gain, will not be permitted by the Court to escape with impunity.

Gentle reader, are you acquainted with the mode of smoking herring?—A dozen of them, or more, are strung on the same stick, and then *hung up*. These fish are generally of the same size—always of the *same kind*. The object in this process, is to *cure* them in the most *effectual manner*. This question, with its answer and explanation, in this place, we admit is strange—" passing strange,"—but its bearing and application, if not seen in the *head* of this case, will be discovered in the sequel.

The defendants above-named, during this Term, were all indicted; the three first named for an Assault and Battery, committed on James M'Donald; the two others separately, for that each of them kept a house in the city of New-York, in which there was a *cock-pit*, for the resort of divers *idle*, *dissolute* persons, of *ill name*, *fame* and *dishonest conversation*, permitted and suffered, by the defendants, to frequent their houses respectively, for the sake of *gain* or *lucre*. To these indictments, John I. Moore, and Peter M'Intyre, by their Counsel, *pleaded guilty*.

On the indictments first mentioned, the two defendants, Meyers and De Witt, were tried and found *Guilty* by the Jury, who acquitted the others.

We shall briefly state the *nature* of the transaction which *provoked* this prosecution, with time, *place*, and circumstance; in which we seriously hope not to be *misunderstood*

On the evening of the 29th day of January last, while the prosecutor, and about fifty "*fowl of the same feather*," had civilly, honestly, peaceably and religiously *flocked* together, at a *cock-pit*, kept by John I. Moore, in Roosevelt-street, and were engaged in the noble and praise-worthy business of betting which *cock would beat or kill the other*, the defendants came also, and very civilly commenced throwing candles across the pit at the prosecutor, with other good and worthy *fowls*, then and there assembled in a *flock*. This was at a season, too, when all *honest cocks*, were or ought to have been at *roost*, with their *hens and chickens*.

The candle-throwing sport was but the prelude to the *grand cock-fighting match*, which followed; the next provocation to which, appeared to be, that Meyers and the prosecutor bet $? on the event of a game, which the latter (as he alleged) won; when calling on him, in a *peaceable* manner, to pay the debt *honorably*, Meyers refused, on the ground (*lex taliones*) that he had previously won $5 of the prosecutor, which he *dishonorably* refused to pay. After considerable *crowing* and *clapping* of *wings*, on both sides, the prosecutor, *raising his angry feathers about his neck*, hoarsely *crowed*, "If it was not for the law, I would spur you down." And soon after *crowed* again, "will you pay me?" The adverse *fowl*, with *crest* erect, and *spurs* prepared, with a loud, short shrill *crow*, responded, "I'll pay you as the cat does the mouse," and immediately jumped up, with extended wings, which suddenly flapping, with one of them he slapped his adversary directly in the face and eyes. The fowl receiving this affront was a *game-cock* of the large raw-boned breed; if we mistake not, *prepared* on Scottish ground; the other, though superior in the nimble use of the *spur*, was younger, and somewhat inferior in weight and strength of *leg* and *wing* to his adversary, who rather seemed to disdain a battle (so he *crowed* in Court) with the inferior fowl.

After this, for about an hour, there was much *strutting* and *angry crowing* by these *fowls* on both sides; and although they had once within that time dipp'd their friendly *bills* in the same *purling stream*, to moisten their dry *parched* tongues, yet their ire was not allayed, and the feelings of wrath and vengeance still stuck in their *crops*. The younger fowl *crowed*, and offered to his adversary to *make up*, who refused!

"*Tantæne animis cœlestibus iræ?*"

Cock fighting gentry say,
For ye, I trow, can tell,
Why in his gen'rous soul
Did such resentment dwell?

At this refusal, lo! the cock-pit was in an instant converted into a "bloody arena" for *human fowl*. The *younger*, with his associate *cocks*, immediately stripped off *quill and feather*, and pitched direful battle with our *Scottish bird*, who was taken unawares, and had not time to *strip himself*. The adverse fowls all *strutted*, and *clucked*, and *pecked*, and *spurred*, and *crowed* against him at the same time. Although heavier than the rest, he was borne, on the *wing of battle*, across the cock-pit, in the twinkling of an eye. Now the battle raged sore. Gaffles of glittering steel, clanging, struck and rebounded from gaffles—blood burst from *combs* of crimson dye sadly torn and mangled—quills of burnished gold, beautiful as the radiant bow of Iris, were rudely plucked from tails, and were scattered like the leaves of autumn—feathers flew round like "the soft fleeces of descending snows" The surrounding fowls began to *raise their angry feathers erect*, and *strut sideways*, and *nod* with threatening note of preparation. Flapping wings *extinguished lights*, and *crowing*, loud, shrill, discordant, yet frequent, was heard around the cock-pit.*

Lo! Mars, seated in his fiery car, with his bride Bellona, in high air, through the dusky shades of night surveyed the cock-pit from afar, and stretched forth, and hung in mid-heaven the golden balance, and weighed the adverse conflicting fates of his favorite birds. Nor long did the scales stand poised. That on which was marked SCOTTISH GLORY, in characters of living flame, mounted high in air, and kicked the beam.

To cut a description short, to which no master of the lyre, since the days of Butler, could do adequate justice—in this *bobbery*, the Scottish *fowl* was sorely bruised, beat and wounded, insomuch that his *ribs were broken—he hung his wings* for a long space of time afterwards, and his *life was greatly despaired of*—to his

* Writers on rhetoric advise us to avoid putting tails to sentences, and to place the most sonorous and musical word at the conclusion of a sentence. We have done so in this instance.

great damage, and against the peace of the *fowls* of the state of New-York, and their dignity.

The whole Court was much *moved* and *affected* at the story of his wrongs.

"*Quis talia fando, temperet a Lachrymis.*"

Hard is the heart of him who tells,
Or even him that hears
Such doleful things, and cannot shed
At least—a pint of tears!

This trial excited much interest among the cock-fighting fraternity of this city; and several witnesses were introduced, some of whom declared they had made a business, for a number of years, in preparing fowls for the cock-pit. This, we understand, is done by keeping them in in a very careful manner in a dark place, feeding them with parched corn, and when brought to the pit for battle, fixing gaffles, or steel instruments, as sharp as needles, on their legs, over the spurs provided by nature for the bird.

The prosecutor and several other witnesses introduced on this trial, immediately after their examination, were laid under a recognizance by the Court, to appear before the Grand Jury then sitting, to give evidence against John I. Moore, who it appeared, also kept a cockpit in Banker-street, but immediately after this affray suppressed the practice in both places.

We know not the source from which the Grand Jury derived information, that during the last season, a cock-pit had been kept at *Washington-Hall*, nor is it material, since it stands confessed on *record!*

By the Court, in pronouncing sentence on these cases respectively, and immediately preceding:

Charles Meyers and Robert de Witt have been convicted of an Assault and Battery committed on James M'Donald. Their case deserves particular notice, rather from the *place* where the affray, in which they were concerned, took place, than from any other circumstance. It took place at a *cock-pit*, kept by John I. Moore, in Roosevelt-street. It is the duty of the Court, as far as may be in their power, to suppress the collection of persons for the purposes in which these defendants were engaged. Under the circumstances, the Court impose a fine of $50 on each of the defendants.

John I. Moore, and Peter M'Intyre, have each been convicted, on their own confession, of keeping a cock-pit in their respective houses; and James Butler has been convicted of keeping a *gambling house*.

Moore, it appears, did not keep an Inn, or public house; and immediately after the affray, which gave rise to this prosecution, entirely suppressed the practice at his house. The Court, under the circumstances of his case, impose on him a fine of $25.

James Butler and Peter M'Intyre keep public houses, to which strangers of the first respectability, visiting our city, resort. The influence of evil example from citizens of apparent good standing, is extremely pernicious. The Court impose a fine of $250 on each of these defendants, and take this occasion, publicly, to declare, that if ever again offences of this description, originating in either of these houses, come under the cognizance of the Court, they will, if possible, inflict a tenfold punishment.

JOHN DENNIS' CASE.

John Dennis a black man, was convicted of an Assault and Battery, committed on Patrick Boyle, with an intent to commit murder. The prosecutor and defendant both lived in the same house in Catherine-street, the first above, the second in the cellar beneath—and there had been a quarrel between them before the affray which gave rise to this prosecution took place. On that occasion, some disturbance took place in the cellar, and some one in the shop above called on the defendant to desist, and threatened to put him in Bridewell. Whereupon he came up with some sharp pointed instrument in his hand behind him, and after some quarrelling he made a smart thrust at Boyle, who had a shovel uplifted in the act of striking the defendant. The instrument passed through the lower part of Boyle's arm, while it was held before his breast in the position of parrying a blow. The defendant was sentenced to the City Prison for six months, and at the end of that term to be recognized to keep the peace for one year in the sum of $100.

CHARLES WEST, *al. dic.* THOMPSON'S CASE.

RODMAN, *Counsel for the prosecution.*
N. B. GRAHAM, *Counsel for the prisoner.*

A slave is not a competent witness against a free man.

The prisoner, a free black, was indicted for Burglary, and on the traverse of the indictment, it appeared that the principal witness on behalf of the prosecution was a slave.

By the Court. He is incompetent.

The prisoner was acquitted.

SUMMARY.

William Benett and Christopher Thomas were indicted, tried, and found guilty of Grand Larceny, in stealing 2 cwt. of sugar, the property of George R. Ricketts and William Ricketts.

Miles M'Donald, a recruiting sergeant, was indicted, tried, and found guilty of Grand Larceny, for stealing a

silver watch, of the value of 26 dolls. the property of Thomas Mahor. He came into the grocery of Mahor, and while the back of the prosecutor was turned, and the prisoner supposed no eye was on him, he stole the watch out of a small drawer, and was discovered by Mrs. Mahor with the watch in his hand, which he attempted to conceal; the chain of which, however, was known by the woman, who called on him for the same, who, with his associates, ran off hastily and could not then be overtaken. He was found a short time afterwards, but the watch has not yet been found.

James Jackson was indicted and convicted on confession of stealing a firkin of butter, the property of Cornelius Schermerhorn.

John Halliday was indicted, tried, and found guilty of stealing a surtout coat and a snuffer-stand, of the value of 25 dolls. the property of Thomas Hodgkinson. The prisoner stole the property and carried it to a pawnbroker's shop in Chatham-street, where he left it in pledge for 2 dolls. When arrested by Jacob Warner, he denied that he had stolen the property, but afterwards admitted it, and went with Warner to the shop and redeemed the same.

William Disley was indicted, tried, and found guilty of Grand Larceny, in stealing a quantity of clothing, of the value of about 10 dolls. the property of Elijah Chandler. The prosecutor is master of the schooner Lively, which, about three weeks ago, and at the time the felony was committed, was lying at the New-Market slip. The property was taken from the cabin, and the prisoner, who was suspected of the felony, being apprehended by Disbrow a watchman, voluntarily confessed it. The confession taken before the Police was read in evidence, and was conclusive against him.

Lucas Segretier, a young foreigner of good appearance, (we judge a Frenchman) at the time of his arraignment and on trial and on receiving his sentence, exhibited a striking spectacle of grief, shame and remorse. He hid his face, which was bathed in tears, and when arraigned, pleaded guilty to an indictment for Grand Larceny, in stealing 310 dolls. in bank bills, the property of Abraham Wood. The Court humanely put him on trial, when it appeared that he stole the money from a portable writing desk in the sitting room of the boarding house kept by the prosecutor, to which the prisoner had access. By introducing his knife, he shoved back the bolt of the lock of the desk. A part of the money was found on him, and he confessed that he stole the whole.

Catherine Williams, a black, was indicted, tried, and found guilty of Grand Larceny, in stealing a quantity of bedding, of the value of 17 dolls. the property of Eliza Halliday.

Mary Williams, a black, was indicted, tried, and found guilty of Grand Larceny, in stealing a number of articles of clothing, of more than 20 dollars, the property of Moses Richards, another black. The wife of the prosecutor keeps a cook-shop, and the prisoner took the property laid in the indictment from an inner room, and part of the clothes were afterwards found on her. Her confession was conclusive in establishment of her guilt.

All the above-named prisoners were sentenced to the State Prison, each for three years and a day.

This Term thirteen were sentenced to the City Prison, chiefly for Petit Larceny, and the Grand Jury found sixty indictments only during the Term.

MARINE COURT.

Present { HENRY WHEATON. / ROBERT SWANTON, and / JOHN B. SCOTT, Esq's. } Justices.

JUAN DE SALEZ, *vs.* JOSE DE SOUZA.

ANTHON, *Counsel for the Plaintiff.*
SAMPSON, *Counsel for the defendant.*

An action for an Assault and Battery committed by one of the subjects of Portugal on another, on board a Portuguese ship on the high seas, may be maintained in the Marine Court of the city of New-York.

The plaintiff, a subject of Portugal, and a seaman on board a ship belonging to that country, commenced an action in this Court for an Assault and Battery committed on him on board the vessel while she was on the high seas, by the defendant, who was also a subject of the same country, and captain of the vessel.

To the declaration in the cause, the defendant pleaded in abatement to the jurisdiction of the Court—thereby alleging, in substance, that he ought not to be compelled to answer to the declaration of the plaintiff *before the said Justices*—because the parties are *subjects of Portugal*, and the cause of action, if any, arose on board a *Portuguese ship on the high seas.*

To this plea there was a general demurrer and joinder. In other words, the above *facts* were admitted; but the *question of law* arising from those facts was put only at issue.

After a learned argument by the Counsel on both sides, Mr. *Justice Wheaton* delivered the following opinion, which contains one of the most luminous expositions of the doctrine relating to the jurisdiction which the Courts of one country may exercise over the subjects of another, that can be found in the books. The decision is in perfect conformity with *pure reason*, on which alone the principles of *universal law* are founded. Seamen are a race of men who, from the peculiar situation in which they are placed, should be treated *ut cives mundi.* As such, the arm of the law should be extended for their protection in every clime.

By the Court, delivered by Mr. *Justice Wheaton:*

This plea can only be supported upon one of the two following grounds, or upon both:

1. That the vessel on board of which the injury is alleged to have been committed, is a *foreign vessel*, and at the time stated was on the high seas.

2. That the parties are both the subjects of the same foreign power. The merchant vessels of a particular country are sometimes said to be *an extention of the territory of that country;* and there is no doubt that by the law of nations, every country has a right of jurisdiction over all matters arising on board its vessels on the high seas; but, it does not follow that this jurisdiction is *exclusive.* The high seas are *extra territorial*, and are within the ex-

clusive jurisdiction of no one power; and even if they were, *trespass on the person* not being a local injury, the action for its redress must be, in its nature, transitory. There seems then to be no objection founded on principles arising from the circumstances that the vessel belonged to a *foreign country*, and at the time when the injury was committed was on the high seas, which can preclude this Court from taking cognizance of this suit. The action is not local by our municipal law, or by the law of any other country; it is an action *in personam*, and the parties are now in this forum. *Actiones personales squuntur forem rei*, is the maxim of the common law, which is our own peculiar code, and also of the civil law, which is the basis of the law of all the countries in the south of Europe. The latter law has also another maxim applicable to certain actions of trespass—*Actio noxalis caput sequitur*, which has been cited by the plaintiff 's Counsel as applicable to this suit; but the *actio noxalis* was given only for injuries done by slaves, and might be brought against their masters to recover damages for the injury. Hence the *caput*, here spoken of, is not that of the defendant, but of the slave, who, when he passed into the hands of a new master, that new master became liable to this action. Thus Justinian (or rather Tribonian) says, " *Omnis autem noxalis actio caput sequitur—Nam, si servus tuus noxam commiserit, quamdiu in tua potestatem pervenerit, cum-ille incipit actio esse.* (Institutes, L. 4. Tit. 8.) *De noxales actionibus.* The former maxim, however, is sufficient to show that this action is transitory in its nature. Will, then, the circumstance of the parties being foreigners have the effect of ousting the Court of its jurisdiction?

Upon principle, there are only two considerations which should seem to favor an affirmative answer to this question. The first is said to be, that the mutual obligations, the respective rights and duties of the master and mariners, are regulated, not by the *jus gentium*, or by that universal maritime law which forms a part of the *jus gentium*, but by the local law of the country where the contract is made, or between whose subjects it is made. The second is the inconvenience that might ensue if foreign seamen, in our ports and harbors, were allowed to litigate with masters upon facts arising out of their mutual contract still remaining in full force.

The first consideration does not seem decisive of the present question. For though the authority of the master over the seamen may be regulated by the municipal law of the country to which the parties belong, there runs throughout the laws of every country, on this subject, a general principle founded on the nature of things. The difficuty in the present case is not greater than in actions *ex contractu* brought upon contracts made in foreign countries, and our municipal Courts are not averse to taking cognizance of such suits, because they must be determined by the *lex loci*. This circumstance does not therefore appear to be conclusive of the question.

The inconvenience of permitting suits to be brought by the crews of foreign vessels in our ports against the masters may be great—but we do not sit here to legislate, or to form diplomatic conventions with foreign powers; and considerations of mere policy and expediency can form but a small ingredient in our decisions.

How then stands the question upon the footing of authority?

The two cases from Robinson's Admiralty Reports, referred to in the case of *Thompson et al vs. the Nancy*, &c. (Bee's Admiralty Reports, p. 217.) were decided upon peculiar grounds, and there is no doctrine to be drawn from them applicable to this case—We therefore accede to the position of the learned judge (Bee), that they are not conclusive against exerting a jurisdiction over foreigners, although their tendency is to discountenance the assumption of such a jurisdiction, except, under peculiar circumstances. Such circumstances, likewise, existed in the two cases cited from Hopkinson. The principles laid down by Brown in his Civil and Admiralty Law, appear to be nothing more than an abstract of the doctrine developed by Sir William Scott, in the first of the Reports above mentioned, in cases from Robinson's Admiralty.

We are, therefore, reduced to the authority of the learned Judge's (Bee's) own decision, which remitted a suit commenced by foreign seamen for their wages to the Courts of their own country. His authority is supported by the decisions of another learned Judge of the Admiralty to the same effect. *Thompson et al vs. Catharine*—Peters' Admiralty Decisions, p. 104. *Willendson vs. the Forsoket*, *ib.* p. 197. Both these Judges were sitting in a Court of Admiralty—a Court of the law of nations, which feels itself at liberty to exercise a species of comity towards the tribunals of other countries, which a Court of common law cannot exercise. If we have jurisdiction of this cause, we are bound to exercise it. If any Court of common law in this country has that jurisdiction, this Court has it; the legislature having invested us with a jurisdiction over this matter as ample as it could give, and having selected very apt expressions to convey the most extensive jurisdiction. The case of *The Courtney*, (1 Edwards' Adm. Rep. 239.) recently decided by Sir William Scott, opens to our view another ground upon which the Court of Admiralty has declined exercising jurisdiction to carry into effect foreign laws against foreigners. This Judge, who has always shown sufficient intrepidity on the prize side of the Court, shrinks with dread under the terrors of prohibition when sitting in

the Instance Court. He is aware that the Admiralty has uniformly been defeated in its conflicts with the Courts of common law, and therefore he wisely declines the combat in every case not clearly within the jurisdiction of the Instance Court. Hence he concludes in the case of *The Courtney*, that the probable effect of his entertaining the suit for the purpose of carrying into effect an act of Congress against an American master, would be a *prohibition*.

In two cases, determined in the English Courts of common law, (before the Independence of the United States) which may be regarded as cotemporaries of each other, because one was tried at *Nisi Prius* before the other was determined in the Court of K. B. In the case of *Mostyn vs. Fabrigas*, (Cowp. p. 161) there is distinctly laid down this proposition, that it is no objection to an action for a personal trespass that the cause of action arose abroad. Here then we have an answer to the first of the two questions which arise in this cause. It is no legal objection to the jurisdiction of the Court in the present case, that the cause of action arose on board a foreign vessel upon the high seas, even supposing the vessel to be a portion of the territory to which she belongs.

In the case of *Rafael vs. Verelst*, (N. Blackstone's, p. 983 and 1055.) the same doctrine is repeated by the Court of C. B. that it is no objection to such an action that the place where the tort happened was in the dominion of a foreign prince, together with this other proposition, that it is no objection to such an action that the plaintiff is an alien, and was a subject of such a foreign prince at the time the injury was committed, for personal injuries are of a personal nature, and *sequuntur forum rei*. We, then, have here a partial answer to the second objection to the jurisdiction of the Court in the present case, which is, that the parties are both foreigners, and subjects of the same foreign country. The authority only fails in instructing us whether it would have strengthened the objection made before the English Court of C. B. had the defendant likewise been an alien and a subject of the same foreign prince with the plaintiff. But though the case of *Rafael vs. Verelet* be imperfect in this respect, it may be said that the case of *Mostyn vs. Fabrigas*, supplies that defect by the explicit *dictum* of Lord Mansfield, that "if two persons fight in France, and both happen casually to be here, (in England) one should bring an action of assault against the other, *it might be a doubt* whether such an action could be maintained here" (in England.) And why might there be a doubt?—"Because, though it is not a criminal prosecution, it must be laid to be against the peace of the king; but the breach of the peace is merely local, though the trespass against the person is transitory—Therefore, *without giving an opinion*, it might, *perhaps*, be triable only were both the parties at the time were subjects." To this difficulty the Court of C. B. have furnished a conclusive answer in the case of *Rafael vs. Verelet*, that "though in all declarations of trespass, it is laid *contra pacem regis*, yet, *that is only matter of form and not traversable.*" Fictions of law, says Lord Mansfield, shall never be contradicted so as to defeat the end for which they were invented, but for every other purpose they may be contradicted. The fiction which lays an action of trespass committed abroad, as if it were committed in breach of the peace of the country where the action is brought, is what the same great and revered authority calls "*a fiction of form.*" It can never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. What was the end for which this fiction was invented? To draw to the domestic forum personal actions, which are transitory in their nature, and therefore follow the person of the defendant. It cannot therefore be contradicted so as to defeat the end. It cannot be traversed. It is founded upon a *formal*, and not a *substantial* distinction of trials. The proceeding is *in personam* and not *in rem*. This formal distinction extends to cases that arise abroad; but if they are transitory, they may be feigned to arise in the body of a country, and the offence as having been committed *contra pacem populi*. These fictions cannot be contradicted or traversed.

There appears to be no solid objection either upon the footing of reason or authority against the exercise of that jurisdiction over the present case, which is given by the statute to this Court. The consequence is, there must be judgment of *respondeat ouster*.